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## DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

(Head notes prepared by M. P. Burks, State Reporter.)

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CRANFORD PAVING CO. v. BAUM AND OTHERS.—Decided at Richmond, April 23, 1896.—*Riely, J.*

1. CONDEMNATION PROCEEDINGS—*Public roads—Damages—Report of commissioners.* In a proceeding to condemn a right of way for a public road the report of a commissioner to assess damages to the land owner is to be taken as conclusive on the question of damages until it is shown to the satisfaction of the court to be insufficient.

2. CONDEMNATION PROCEEDINGS—*View by commissioners—Report of commissioners—Weight given to—Case at bar.* In condemnation proceedings to acquire land for a public use the law lays great stress upon the matter of the view, and great weight is attached to the report of the commissioners to assess damages. In addition to other evidence they have the evidence of their own senses, and it should be a very clear case of inadequate compensation to justify an interference by the court with the finding of the commissioners. In the case at bar the evidence taken before the commissioners was returned with their report and no oral evidence was introduced before the court. The evidence was conflicting, but was sufficient to justify the finding of the commissioners. It was proper, therefore, for the court to decline to disturb the finding of the commissioners.

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ENGLEMAN v. ENGLEMAN.—Decided at Staunton, September 27, 1899.—*Harrison, J.* Absent, *Keith, P.*

1. APPEAL AND ERROR—*Suit in chancery—Incompetent evidence.* This court will not reverse a decree in a chancery suit merely because incompetent and illegal evidence appears in the record. It will consider only the legitimate evidence and determine the rights of the parties upon that.

2. MARRIAGE AND DIVORCE.—*Alimony—Counsel fees—Case in judgment.* Under the facts in this case the husband is not entitled to a divorce either for adultery or desertion, and the wife is not precluded by her deed from claiming an allowance for counsel fees in the suit for divorce brought against her by her husband. No such suit was had in view when the deed was made.

3. MARRIAGE AND DIVORCE.—*Alimony—Counsel fees in Court of Appeals—Husband's liability.* The measure of the husband's liability to pay the expenses of the wife's defence to a suit for divorce brought by him depends upon his ability to meet them, and, in the absence of anything in the record to guide this court, it will not make an allowance for fees of counsel in this court, but will adhere to the sum fixed by the trial court.

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ELDRED AND OTHERS v. ELDRED.—Decided at Richmond, November 16, 1899.—*Cardwell, J.*

1. MARRIAGE—*How proved—Reputation, declarations and conduct—Presumption.* Marriage may be proved in civil cases, other than actions for seduction, by reputa-

tion, declarations and the conduct of the parties. But, to raise the presumption of marriage, the reputation must be founded on general, not divided or singular, opinion; and, where the declarations of the parties are relied on, the circumstances under which they are made must determine their value.

2. **MARRIAGE**—*Proof—Conduct of parties—Presumption.* In the interest of morality and decency the law presumes marriage between a man and woman when they live together ostensibly as man and wife, demeaning themselves towards each other as such, and are received into society and treated by their friends and relatives as having and being entitled to that status. But cohabitation and repute do not constitute marriage. They are only evidence tending to raise a presumption of marriage, and, like other presumptions of fact, may be overcome by counter-vailing evidence.

3. **MARRIAGE**—*Declarations and repute contemporaneous with conduct.* The declarations of parties and other attendant circumstances of cohabitation, all which are admissible as parts of the *res gestæ* to prove marriage, must, together with the repute originating therefrom, be contemporaneous with the intercourse, and not subsequent.

4. **MARRIAGE**—*Matrimonial cohabitation—Presumption.* The presumption of marriage, from cohabitation, apparently matrimonial, is very strong, especially where legitimacy is involved; and this presumption can only be overcome by cogent and satisfactory proof. But to raise this presumption the cohabitation must appear to be a matrimonial cohabitation. Mere cohabitation is not sufficient. It must be attended with such conduct as would justify the repute of the marriage.

5. **MARRIAGE**—*Particular time and place—Presumption as to other time and place.* If a party undertakes to establish marriage between a man and woman at one time and place, he cannot rely upon other facts and circumstances to raise a presumption of marriage at some other time and place.

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**NORFOLK & WESTERN RAILWAY CO. v. MARPOLE.**—Decided at Richmond, November 16, 1899. *Cardwell, J.*

1. **APPEAL AND ERROR**—*New trial—Excluding evidence—Harmless error.* A new trial will not be granted for refusal to permit certain evidence to be introduced when substantially the same evidence was received without objection at a later stage of the trial.

2. **RAILROADS**—*Overhead bridges—Contributory negligence.* It is negligence for a railroad company to operate its road with an overhead bridge too low for its employees whose duties are on top of the cars, to pass when standing on the cars, in the discharge of their duties, but if an employee knows, or ought to know of the dangerous condition of the bridge, and fails to use ordinary care to protect himself, in consequence of which he is injured, he is guilty of contributory negligence and cannot recover for the injury. The fact that the employee does not know of his exact locality, or the proximity of the bridge by reason of darkness, fog, or other natural or artificial causes incident to his employment is immaterial.

3. **APPEAL AND ERROR**—*Instructions—Jury sufficiently instructed.*—This court will not reverse for refusal to give an instruction which correctly states the law when another instruction covering the same point has been given in lieu thereof.